

**CURRENT DEVELOPMENTS: LAWYERS' OPINIONS
IN BANKING TRANSACTIONS**

QUESTIONS AND ANSWERS

Question - Rowan Russell (Mallesons Stephen Jaques):

Something has been said about the need to make independent enquiry when one is asked to give an opinion on facts on the basis of a certificate from one's client. I wonder whether Tom or one of the other members of the panel would like to comment on the degree of responsibility, if any, which is to be placed on a lawyer who gives an opinion which includes his opinion on the basis of interstate laws which he is giving in turn on the basis of either a disclosed or undisclosed opinion from his agents. Is there any responsibility to check the validity of that opinion on interstate law or can one take it at face value and in particular is it necessary to disclose the source of your opinion on interstate law.

Response - Tom Poulton:

My own view is that there is a very heavy responsibility on the lawyer who includes in his opinion matters of interstate law. It is becoming increasingly common. I go through the exercise myself with Papua New Guinea and some of the opinions that have come out of there requires a lot of work on my own part to get them into line with something which I think ought to represent the law in Papua New Guinea. The additional difficulty is that you are quite often asked to include in your own opinion a statement that you believe it is reasonable for the addressee of your own opinion to rely on the other lawyer's opinion. That fairly squarely leaves it at your doorstep and at that point the responsibility mainly lies with you. You have got backup insurance maybe if you want to put it that way, but you had better check it pretty carefully yourself.

Question - John King (Russell McVeagh McKenzie Bartleet):

Just coming back to the important part of fees. Roland in view of the heavy responsibilities are there any rules of thumb or attitudes taken in fixing fees. For example, what do you add to your fee in the States if you are giving an opinion as a borrower's solicitor as opposed to what would be the fee if you didn't?

Response - Roland Brandel:

Do you have anti-trust principles here that prohibit discussions of prices? I cannot answer that very explicitly because I do not know. That is not a part of my practice on a day to day basis. I can tell you however where we are giving opinions and the exposure is high we do not bill out at an hourly rate. I know in some transactions some law firms are starting to move toward a percentage of the value of the transaction which would make it look an awful lot like an insurance policy. To my knowledge we have never done that but I believe that we would charge a premium over our ordinary billing rate in those instances where we were asked to provide a legal opinion.

Question - Peter Ratner (Rudd Watts & Stone, Wellington):

And if my colleagues become embarrassed by my ignorance you will be able to tell from the accent that I share your guilt in the proliferation of these. I have a comment and a question. The comment being I have noted at least in the New Zealand practice where I act for the borrowers that I think many of the provisions in these were simply designed for financial transactions, what are considered primary provisions as the borrower's solicitor state that an agreement prepared by the lender's attorneys is a legal, valid and enforceable one. I have a great deal of difficulty as the borrower's solicitor who has argued against many of the provisions being included in there and being told to take it or leave it. Perhaps you could say that that agreement is strictly a transaction entirely within New Zealand. If they had to opine on that I think we get carried away with these on the other end.

The question (and I have come across this in a number of international transactions and have never been able to come up with anybody who would tell me the reason for it) why isn't it at all significant that the borrower's country is a member and entitled to use the resources of the International Monetary Fund? I would appreciate knowing.

Response - Suzanne Corcoran:

I am not absolutely certain about this either quite frankly but generally and very often if a country is involved in a borrowing and they cannot repay the borrowing the International Monetary Fund will step in and help with rescheduling the payments etc.